1969 *Present :* Samerawickrame, J.

V. A. MOHAMED, Appellant, *and* M. L. A. WAHAB, Respondent

S. C. 102/67—C. R. Matale, 15263

Rent Restriction Act—Section 12A(1) (a)—Action in ejectment thereunder—Tender of the rent due, before institution of action—Non-liability of tenant to be ejected then.

Where, in a case governed by section 12A (1) (*a*) of the Rent Restriction Act a landlord seeks ejectment of his tenant on the ground that rent has been in arrears for a period of three months or more after it has become due, the tenant is not liable to be ejected if, before the date of institution of action, he tenders to the landlord the rent due.

APPEAL from a judgment of the Court of Requests, Matale.

Nihal Jayawickrame, for the defendant-appellant.

E. R. S. R. Coomaraswamy, with *N. R. M. Daluwatte* and *S. K. H. Wijetilleke*, for the plaintiff-respondent.

Cur. adv. vult.

April 26, 1969. SAMERAWICKRAME, J.—

The learned Commissioner of Requests has entered a decree for ejectment of the defendant from premises bearing assessment No. 226 King Street, Matale, of which he was in occupation as tenant, on the ground that rent had been in arrears for a period of over three months after it had become due. Counsel for the defendant-appellant submits that rent had not been in arrear for a period of three months within the meaning of Section 12A (1) (*a*) of the Rent Restriction Act for the reason that the defendant-appellant had made payments before action was filed. Learned Counsel for the plaintiff-respondent contended that a tenant who had failed to make payment of rent for a period of three months was liable to be ejected under the provision in question even

though he made tender of the rent due before institution of action. He relied on a judgment of a Divisional Bench in the case of *Dias v. Vincent Gomes* [1].

The Divisional Bench considered the provision in s. 13 (1) of the Rent Restriction Act which is as follows :—

"Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Act applies shall be instituted in or entertained by any court, unless the board, on the application of the landlord, has in writing authorised the institution of such action or proceedings :

Provided, however, that the authorization of the board shall not be necessary, and no application for such authorization may be entertained by the Board, in any case where—

(*a*) rent has been in arrear for one month after it has become due ; "

The Court held that once a tenant has been in arrears of rent for one month after it has become due, he forfeits the protection given to him by the Act against being ejected and that he cannot regain the protection by the mere act of tendering the arrears before the institution of action. The provision which was considered by the Divisional Court sets out the circumstances where authorization of the board was not necessary. It also provides that in those circumstances no application for authorization may be entertained by the board. It would thus appear that the circumstances were considered to be such as have arisen at the stage of an application to the board made prior to the filing of an action. There was, therefore, if I may say so with respect, good ground for the Divisional Court to hold that the provision contemplated rent being in arrear at a time prior to the institution of the action.

Act No. 10 of 1961 amended s. 13 by insertion after sub-section (1) of new sub-sections (1A) and (1B) which are as follows :—

"(1A) The landlord of any premises to which this Act applies shall not be entitled to institute any action or proceedings for the ejectment of the tenant of such premises on the ground that the rent of such premises has been in arrear for one month after it has become due,—

(*a*) if the landlord has not given the tenant three months' notice of the termination of the tenancy, or

(*b*) if the tenant has, before such date of termination of the tenancy as is specified in the landlord's notice of such termination, tendered to the landlord all arrears of rent.

[1] *(1954) 55 N. L. R. 337.*

(1B) Where any action or proceedings for the ejectment of the tenant of any premises to which this Act applies is or are instituted on the ground that rent has been in arrear for one month after it has become due, the court may, on being satisfied that the rent has been in arrear on account of the tenant's illness or unemployment or other sufficient cause, make order that a writ for ejectment of the tenant from those premises shall not issue if the tenant pays to the court the arrears of rent either in a lump sum on such date, or in instalments on such dates, as may be specified in the Order ; and if the tenant pays to the court the arrears of rent on such date or dates, his tenancy of those premises shall, notwithstanding its termination by the landlord of those premises, be deemed not to have been terminated."

After these amendments a landlord could file action for ejectment of a tenant only if a tenant in spite of three months' notice of termination of the tenancy fails to tender arrears of rent within that period. The Court is given further power to give relief to the tenant, if it is satisfied, that rent had been in arrear on account of illness, unemployment or other sufficient cause.

Act No. 12 of 1966 made s. 13 inapplicable to premises where the standard rent does not exceed Rs. 100 per mensem and introduced the new section 12A. Sub-section (2) of that section reproduces in substance s. 13 (1B). The original s. 13, including sub-sections (1A) and (1B) continue to apply to premises where the standard rent exceeds Rs. 100. The relevant part of s. 12A reads :—

"12A (1) Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Act applies and the standard rent of which for a month does not exceed one hundred rupees shall be instituted or entertained by any court unless where—

(*a*) the rent of such premises has been in arrear for three months or more after it has become due, ... "

It appears to me unlikely that the legislature intended that tenants of premises whose standard rent is below Rs. 100 should be liable to be ejected by reason of arrears of rent, even though there had been a tender of rent before the actual institution of the action. It is not probable that the legislature intended that tenants of such premises should be placed in a worse position in this regard than the tenants of premises whose standard rent is in excess of Rs. 100. Nor is it probable that the legislature intended to place tenants of such premises in a position of so much greater disadvantage compared to that which they enjoyed under the law before it was amended by Act 12 of 1966. It is also relevant that the provision in sub-section (2) which empowers the Court to permit

a tenant to pay into court the arrears of rent and in such case not to issue a writ of ejectment is some indication that the legislature contemplated arrears due at the date of institution of action.

In the case of *Abdul Samad v. Sirinayake*[1], Alles J., appears to have taken the view that the section referred to arrears of rent due at the date of the institution of the action. He stated :—

> "For the plaintiff to succeed in appeal he must satisfy the Court in this case that the defendant was in arrears of rent for three months at the time of the institution of the action on 2.7.64."

The terms in which reference is made in sub-section (2) of s. 12A to an action brought under s. 12A (1) (*a*) is also significant — "Where any action or proceedings for the ejectment of the tenant of any premises referred to in sub-section (1) is or are instituted on the ground that rent has been in arrear for three months or more after it has become due, the court may . . . . "—

I think, this provision indicates the nature of an action brought under sub-section 12A (1) (*a*), namely, that it is brought on the ground that rent has been in arrear for three months or more. One would normally expect a ground of an action to subsist at the date of its institution. The words "has been" may be used to denote a fact continuing to subsist up to the occurrence of a certain event or the performance of some act—*vide Ex parte Kinning*[2]. It appears to me, therefore, that in s. 12A (1) (*a*) the requirement that rent has been in arrear for three months or more after it has become due is not satisfied unless rent is in arrear up to and at the date of the institution of the action.

The learned Commissioner took the view that the plaintiff was entitled to a decree for ejectment because on the date of the termination of the contract of tenancy, the defendant was clearly in arrears of rent for more than three months. Having regard to the conclusion I have arrived at that the matter of arrears of rent must be considered as at the date of the institution of the action, the decision of the learned Commissioner cannot be sustained. I accordingly, allow the appeal and set aside the order appealed from and direct judgment to be entered dismissing the plaintiff's action. The defendant-appellant will be entitled to costs of appeal and costs in the trial court.

Appeal allowed.

[1] *(1967) 70 N. L. R. 47 at 48.*

[2] *16 Law Journal Q. B. 257.*